Supreme Court, U.S.
FILED

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No. _____

SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1996

DAVID A. SOSNE, TRUSTEE

Petitioner,

V.

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions arise out of the Respondents' willful violation of the automatic stay provisions of 11 U.S.C. §362, in that the Respondents were aware of the Debtor's bankruptcy filing and intentionally continued a post-petition execution against the Debtor to enforce a pre-petition judgment:

1. Whether a Bankruptcy Court has the power to issue a punitive damage award under 11 U.S.C. §362(h) for intentional violations of the automatic stay provisions of 11 U.S.C. §362 in proceedings involving corporate debtors?

2. Whether a Bankruptcy Court has the power to issue non-compensatory damage awards under 11 U.S.C. §105 for intentional violations of the automatic stay provisions of 11 U.S.C. §362?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were David A. Sosne, United States Chapter 7 Bankruptcy Trustee (the Plaintiff below and the Petitioner in this proceeding); Reinert and Duree, P.C. (a/k/a Reinert, Duree, Collins, P.C., a/k/a Reinert, Duree & Crane, P.C.), Gary Robbins, Robbins & Associates, Inc.*, Estes & Estes, Inc.* and James C. Landes (the Defendants below and the Respondents in this proceeding) and Just Brakes Corporate Systems, Inc. (the "Debtor").

* Petitioner is unaware of any parent company or wholly owned subsidiary of Robbins & Associates, Inc. or Estes and Estes, Inc.

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2. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS ENTERED A DECISION WHICH PRECLUDES A BANKRUPTCY COURT FROM AWARDING NON-COMPENSATORY DAMAGES UNDER 11 U.S.C. §105 FOR INTENTIONAL VIOLATIONS OF THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §362. THIS DECISION IS IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THIS SAME IMPORTANT MATTER. 20

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ORDERS AND OPINIONS BELOW

A. BANKRUPTCY COURT.

The July 11, 1994 Order, the November 30, 1994 Order and the November 30, 1994 Memorandum of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division entered in David A. Sosne, Trustee v. Reinert & Duree, P.C., et al. (In Re Just Brakes Corporate Systems, Inc.), Cause No. 91-46618-172 and Adv. No. 92-4384-172, are reproduced in the Appendix ("App") at pp. 17-46. Said Orders and Memorandum were officially reported as In Re Just Brakes Corporate Systems, Inc., 175 B.R. 288 (Bkrtcy. E.D. Mo. 1994).

B. DISTRICT COURT.

The March 29, 1996 Memorandum and Order of the United States District Court, Eastern District of Missouri, Eastern Division entered in David A. Sosne, Trustee v. Reinert & Duree, P.C., et al. (In Re Just Brakes Corporate Systems, Inc.), Cause No. 4:95 CV 226 SNL is reproduced in the App. at pp. 47-51.

C. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The March 13, 1997 Order of the United States Court of Appeals For The Eighth Circuit entered in David A. Sosne, Trustee v. Reinert & Duree, P.C., et al. (In Re Just Brakes Corporate Systems, Inc.), Cause No. 96-2078 is reproduced in the App. at pp.4-16.

JURISDICTIONAL STATEMENT

The Order of United States Court of Appeals For The Eighth Circuit sought to be reviewed was entered on March 13, 1997. On or about March 25, 1997 the Petitioner filed a Petition for Rehearing, En Banc, Or, In The Alternative, For A Rehearing By The Panel. On April 14, 1997, the United States Court of Appeals For The Eighth Circuit issued an Order Denying Petition For Rehearing And Suggestion For Rehearing En Banc. This Petition is filed within 90 days of the Order sought to be reviewed. This Court has jurisdiction under 28 U.S.C. §1254(1). In this proceeding, the constitutionality of 11 U.S.C. §105(a) may be drawn into question. The notification required by Supreme Court Rule 29.4(b) has been made.

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. §362, 11 U.S.C. §105 and Article III of the United States Constitution. The text of these provisions is reproduced in the App.

STATEMENT OF THE CASE

This case pertains to deliberate actions taken by the Respondents to levy upon, seize and sell an asset of Just Brakes Corporation Systems, Inc. (the "Debtor") in flagrant disregard of the prohibition of 11 U.S.C. §362. This petition seeks a review of a decision of the United States

Court of Appeals for the Eighth Circuit which limits the authority of United States Bankruptcy Courts to award damages or remedy such violations.

On September 28, 1988, Respondents, by and through their attorneys, Respondent Reinert & Duree, P.C. (f/k/a Reinert, Duree & Crane, P.C.), recovered a judgment against the Debtor in the principal sum of approximately $133,083.00 plus interest in the Circuit Court of St. Louis County, Missouri (hereinafter the "State Court") in Cause No. 542798. (App. at p. 33) On January 10, 1991, the Debtor executed an "Assignment of Registration of a Mark" which purported to assign and transfer all its right, title and interest in the trademark/service mark "Just Brakes" (hereinafter the "Trademark") to F.G.R. Management, Inc. ("F.G.R."). On January 23, 1991, thirteen days after the purported transfer, Respondents obtained a temporary restraining order from the State Court in Cause No. 619506,

enjoining the Debtor and certain individuals named as statutory trustees of the Debtor from transferring the trademark to F.G.R. A separate proceeding was commenced in State Court against F.G.R., being Cause No. 620825, which sought similar relief and which was consolidated with Cause No. 619506. On February 21, 1991 a preliminary injunction was entered by the State Court restraining the Debtor from transferring, encumbering or disposing of in any manner assets of the Debtor, including the trademark.

On March 12, 1991, Respondents amended their previous petition for restraining order by filing an "Amendment by Interlineation" with the State Court. In their amendment, Respondents disclosed to the State Court that on January 10, 1991, the date of the purported assignment of the trademark, the Debtor was an insolvent corporation and had forfeited its corporate charter. In the amendment, the Respondents asserted that the only party

which would have had authority to take any actions on behalf of the Debtor on January 10, 1991 would have been the statutory trustees of the dissolved Debtor. Respondents further asserted that the January 10, 1991 assignment could not have had any legal effect since the Debtor had not been reinstated as a corporation in good standing. Respondents further asserted that even if the Debtor had been reinstated at that time, it was not before the date that the Respondents had secured their temporary restraining order on January 23, 1991. Respondents then asserted that "the purported assignment of January 10, 1991 is, as a matter of law, invalid". Respondents requested the state court to declare that the then current owner of the trademark was the Debtor.

On July 16, 1991 Respondents procured an order from the State Court barring the Debtor from transferring the trademark and further directing that the Debtor's trademark be sold at a sheriff's sale to satisfy the Respondents'

judgment against the Debtor. Implicit in this Order was a finding that the asset in question belonged to the Debtor, since F.G.R., the purported assignee, had been joined as a party pursuant to the consolidation of the separate proceedings.

On July 30, 1991, the Debtor filed a petition for reorganization under Chapter 11 of the Bankruptcy Code (the first bankruptcy). (App. at p. 33) This petition was filed prior to the Sheriff's sale of the Debtor's trademark pursuant to the July 16, 1991 order. (App. at p. 34) As the filing of the petition under Chapter 11 operated as a stay of all collection activity on the Debtor's pre-petition debt, including the Respondents' judgment, pursuant to the provisions of the automatic stay, 11 U.S.C. §362, the sale was halted. (Id.)

Upon motion of Respondents, on September 24, 1991 the Bankruptcy Judge, the Honorable James J. Barta,

dismissed the first bankruptcy and terminated the automatic stay. (Id.) As part of his "Findings and Conclusions" in the first bankruptcy, Judge Barta determined that:

> As of the commencement of this [Chapter 11] case, the Debtor held and continues to hold an interest in the trademark which is its claim for the avoidance of the pre-petition [Chapter 11] assignment to [F.G.R. Management, Inc.] This claim is an asset of the [Chapter 11] bankruptcy estate.

A copy of this order was mailed to Respondents. (App. at pp. 34 and 35)

After dismissal of the first bankruptcy case, the State Court directed that a sale of the Debtor's assets be conducted at 12:00 Noon on October 15, 1991 to satisfy Respondents' judgment against the Debtor. (App. at p. 35) The Debtor filed its Chapter 7 petition that commenced the instant case on October 15, 1991 at 9:12 a.m. (Id.) A file-stamped copy of the petition was faxed to the Respondent law firm prior to the scheduled foreclosure sale (Id.) Members of the

Respondent law firm were given oral notice of the commencement of the bankruptcy case at approximately 10:00 a.m., two hours prior to the scheduled sale. (App. at pp. 35 and 36)

Immediately before the sale, an attorney for F.G.R. objected to a continuation of the sale and informed Respondents, the Sheriff and the State Court of the Debtor's bankruptcy filing. (Id.) The Respondents ignored the bankruptcy filing and the automatic stay provisions of 11 U.S.C. §362 and continued with the foreclosure sale. (App. at pp. 36 and 37) The sale generated gross proceeds in the amount of $105,000. (Id.) On October 24, 1991, without having requested relief from the automatic stay, Respondents deliberately sought and obtained an order from the State Court that directed the payout of the net sale proceeds to Respondents. (App. at p. 37) The net amount of the sale proceeds received by the Respondent law firm was

$100,717.00 which sum was retained by them as fees for their serving in the State Court litigation. (Id.)

On September 18, 1992 the Chapter 7 Bankruptcy Trustee, Petitioner herein, commenced an adversary proceeding in the Bankruptcy Court for violation of the automatic stay and for other relief. (Id.) On July 11, 1994 the Honorable James J. Barta sustained the Petitioner's motion for summary judgment in part, finding that the Respondents had violated the automatic stay. (App. at p. 17) At that time, Judge Barta held open the issue as to whether Respondents' actions in violating the stay were "willful". (App. at pp. 24 and 25) Thereafter, on September 19, 1994, the Petitioner filed a second motion for summary judgment on the issue of "willfulness". (App. at p. 31) This motion was supported by affidavits and deposition testimony secured through discovery. On November 30, 1994 Judge Barta sustained the Petitioner's second motion for summary

judgment, finding that Respondents' violation of the automatic stay had been willful and that "the Defendant's willful violation of the automatic stay has prevented the trustee from liquidating the asset." (App. at p. 31) The Court found that the "appropriate measure of the money judgment here is the voidable transfer that resulted from the violation of the automatic stay." (App. at p. 41) Accordingly, the Court ordered Respondents to pay Petitioner (the Trustee of the bankruptcy estate) the sum of $100,717 (the net amount of the sale proceeds) for the willful violation of the automatic stay. (App. at p. 42)

On December 2, 1994, Respondents filed an appeal in U.S. District Court appealing the July 11, 1994 order and the November 30, 1994 order which granted summary judgment in favor of the Petitioner. On March 29, 1996 the Honorable Stephen N. Limbaugh of the United State District Court for the Eastern District of Missouri entered an

order affirming the ruling of the Bankruptcy Court. (App. at p. 47) On March 13, 1997, the United States Court of Appeals For The Eighth Circuit issued its order which affirmed the finding that the automatic stay had been willfully violated but reversed the lower courts' decision as to the propriety of the damage award and remanded the case for further proceedings. (App. at p. 4)

The Petitioner's adversary proceeding was commenced pursuant to Section 157(b)(2)(A), (G) and (O) of Title 28 of the United States Code. The bankruptcy court had jurisdiction over the parties and the matter pursuant to 28 U.S.C. Sections 151, 157 and 1334, and Rule 29 of the Local Rules of the United States District court for the Eastern District of Missouri. The bankruptcy court granted summary judgment pursuant to Fed.R.Civ.P. 56, made applicable by Fed.R.Bank.P. 7056. The summary judgment was entered on November 30, 1994. The Respondents filed

a Notice of Appeal to the United States District Court, Eastern District of Missouri, Eastern Division, on December 2, 1994. That court had jurisdiction pursuant to Fed.R.Bank.P. 8001 and 28 U.S.C. §158(a). The District Court affirmed the bankruptcy court decision on March 29, 1996. That decision was appealable to the Eighth Circuit pursuant to 28 U.S.C. §1291 and §1295. The Respondents filed their Notice of Appeal to the Eighth Circuit on April 1, 1996. The Eighth Circuit rendered its decision on March 13, 1997. This Petition is being filed pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS ENTERED A DECISION WHICH PRECLUDES A BANKRUPTCY COURT FROM AWARDING PUNITIVE DAMAGES UNDER 11 U.S.C. §362 FOR INTENTIONAL

VIOLATIONS OF THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §362 IN PROCEEDINGS INVOLVING CORPORATE DEBTORS. THIS DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THIS SAME IMPORTANT MATTER.

As pointed out by the Eighth Circuit, its opinion is in direct conflict with decisions of other circuits which have addressed this same important issue. (App. at p.11) The leading case in opposition to the Eighth Circuit decision is Budget Serv. Co. v Better Homes of Va., Inc., 804 F.2d 289 (4th Cir.1986). In Budget Serv. Co. the Fourth Circuit held that the term "individual" as set forth in 11 U.S.C. §362 (h) includes corporate debtors. The Fourth Circuit focused upon the importance of the automatic stay to the bankruptcy proceeding as echoed by the legislative history

of 11 U.S.C. §362. The legislative history of 11 U.S.C. §362 provides in part that:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. House Report No. 95-595, 95th Cong. 1st Sess. 340-2 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 54-55 (1978); reprinted in 1978 U.S. Code Cong. & Adm. News 5787 at 5840 and 6296-7. See Budget Serv. Co. at 292.

The Fourth Circuit found that section 362(h) must be read in conjunction with the rest of Section 362 and that its sanctions are not limited to the relief of an "individual" in the literal sense. Budget Service Co. at 292. The Court went on to state that it was "unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the

[Bankruptcy] Code as opposed to debtors which are corporations..." Id. The Fourth Circuit's reasoning centered on the concept that a narrow reading of Section 362(h) would frustrate the purpose and policy of the automatic stay provision to give debtors a "fresh start" and to permit debtors to attempt repayment or reorganization plans. Id.[1]

The Budget Service Co. holding was followed by the Third Circuit in In Re Atlantic Business And Community Corp., 901 F. 2d 325 (3rd Cir. 1990). Citing the Budget Service case, the Third Circuit held that: "[a]lthough Section 362(h) refers to an individual, the

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[1] Implicit in the Fourth Circuit decision is the conclusion that this is one of the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." See U.S. v. Ron Pair Enterprises, Inc., 109 S.Ct. 1026, 1031 (1989). The Petitioner submits that there is the very important federal interest of preserving the integrity of the automatic stay provisions of the Bankruptcy Code which is present in the instant proceeding.

section has uniformly been held to be applicable to a corporate debtor." In Re Atlantic and Community Corp. at 329.

Other circuits have held that the section 362(h) remedy is available only to natural persons. The Court of Appeals for the Second Circuit , in In Re Chateaugay Corp., 920 F.2d 183 (2nd Cir. 1990), held that the remedy under 11 U.S.C. §362(h) is not available to corporate debtors, but instead is limited to debtors who are natural persons. The court reasoned that the context in which the term "individual" is used in section 362(h) suggests a natural person, not a partnership or corporation:

> We have not located any legislative history to suggest that §362(h) was meant to apply to "persons," rather than being confined to "individuals." The section was added as part of the Bankruptcy Amendments and Federal Judgeship Act Of 1984 Pub.L. No. 98-353,

> 98 Stat. 333, 352, 1984 U.S. Code Cong. & Admin. News (98 Stat) 333, 352 (1984). There is no published legislative history suggesting the possibility of a drafting error or other inadvertence. Appellee conceded during oral argument that there is no legislative history showing that the section was meant to apply to "persons." Therefore, this is not one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. Ron Pair Enterprises, Inc., 109 S.Ct. at 1031 (brackets in original). In Re Chateaugay Corp. at 185.

The Court of Appeals for the Ninth Circuit followed the Second Circuit and held in In Re Goodman, 991 F.2d 613 (9th Cir. 1993) that the term "individual" as used in 11 U.S.C. §362(h) is not broad enough to include corporations. More recently, the Eleventh Circuit in Jove Engineering, Inc. v. IRS, 92 F.3d 1539 (11th Cir. 1996) followed the Second and Ninth Circuit. In rendering the decision for which the Petitioner seeks review by a Writ of

Certiorari, the Eighth Circuit has also decided to follow the reasoning of the Second Circuit and Ninth Circuit.

Another line of cases which address the issue of whether a bankruptcy trustee is an individual within the meaning of 362(h) further illustrates the divergence among the circuits on the scope of section 362(h) and the need for guidance. In In Re Pace, 67 F.3d 187 (9th Cir. 1995), the Ninth Circuit was presented with the issue of whether a court appointed panel Trustee of an individual Chapter 7 proceeding could recover damages under 11 U.S.C. §362(h). The Ninth Circuit read the term "individual" contained in 11 U.S.C. §362(h) narrowly and held that a trustee of an individual bankruptcy estate could not recover damages under Section 362(h). As stated by the Ninth Circuit:

> There is no controlling authority from this or any other circuit that answers the question posed. Even the BAP split on this issue,

> with one Judge concluding that the trustee was an individual for purposes of section 362(h) because he was an individual representing the estate of an individual, while the other two judges held that, because a trustee represents a thing and not a natural person, a trustee is not an individual entitled to recover damages under section 362(h). In Re Pace, at 192.

The Ninth Circuit concluded that the Chapter 7 trustee was not an "individual" entitled to recover attorneys fees as damages for a willful violation of the automatic stay. The rationale of the Court was that any harm suffered in the form of costs and attorneys fees was actually incurred by the bankruptcy estate, not by a trustee as a natural person. This narrow reading of Section 362(h) would preclude bankruptcy courts from awarding sanctions under Section 362(h) even in cases involving a chapter 7 trustee of an individual bankruptcy estate. The only application of Section 362(h) under this analysis, would be for individual chapter 13 proceedings.

2. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS ENTERED A DECISION WHICH PRECLUDES A BANKRUPTCY COURT FROM AWARDING NON-COMPENSATORY DAMAGES UNDER 11 U.S.C. §105 FOR INTENTIONAL VIOLATIONS OF THE AUTOMATIC STAY PROVISIONS OF 11 U.S.C. §362. THIS DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THIS SAME IMPORTANT MATTER.

The United States Bankruptcy Court For The Eastern District of Missouri, Eastern Division, the United States District Court, Eastern District of Missouri and the United States Court of Appeals For The Eighth Circuit are all in agreement that the Respondents violated the automatic stay provisions of 11 U.S.C. Section 362(a)(6) (App. at pp. 8-10, 23 and 50) which provides:

> ...[a] petition filed under... this title... operates as a stay... of (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

As stated by the Eighth Circuit: "After the sale, [Respondents] applied to the state court and received the sale proceeds out of escrow, clearly an act to collect on their judgment." (App. at pp. 9 and 10) Although it finds that a clear violation of the automatic stay occurred, the Eighth Circuit concluded that"... Congress has conferred no power to punish for a violation of §362(a), other than the punitive damage authority in §362(h)." (App. at pp. 12 and 13) Having concluded that the Bankruptcy Courts have no power to punish violations of the automatic stay provisions of §362(a), the Eighth Circuit went on to hold that §362(a) buttressed by §105(a) confers broad equitable powers to remedy adverse effects of automatic stay violations. (App. at pp. 13 and 14) Having recognized this

power, however, the Eighth Circuit fails to adequately define the remedy available to the Bankruptcy Court absent a finding of actual damages. Under this analysis, the extent of the Bankruptcy Courts' power to remedy violations of the automatic stay provisions of Section 362 remains unclear.

Although the Eighth Circuit focuses upon the "broad equitable power [of the bankruptcy court] to remedy adverse effects of automatic stay violations", the issue involved is essentially the authority of the Bankruptcy Court to award damages for contempt. The law of contempt, as applied to Bankruptcy Courts, is unsettled. Appellate courts are divided on the validity of the Bankruptcy Court's authority over the various forms of contempt.

In Jove Engineering, Inc. v. I.R.S., 92 F.3d 1539 (11th Cir. 1996), the Eleventh Circuit addressed the issue of the authority of the Bankruptcy Court to award damages for contempt. The Eleventh Circuit distinguished the Bankruptcy

Court's inherent contempt powers from the statutory contempt powers derived from 11 U.S.C. Sec. 105. The Eleventh Circuit also distinguished between coercive or civil contempt sanctions from punitive or criminal sanctions. As stated by the Eleventh Circuit, "The purpose of civil contempt sanctions is to (1) compensate the complainant for losses and expenses it incurred because of the contemptuous act, and (2) coerce the contemnor into complying with the court order". Jove Engineering, Inc. at 1557. The Eleventh Circuit distinguished punitive damages which are damages which are imposed retrospectively for a completed act of disobedience, which cannot be avoided or abbreviated by the contemnor through later compliance.

The Eleventh Circuit held that the Bankruptcy Court's inherent authority is limited to civil contempt and that: "sanctions imposed for civil contempt to coerce compliance 'cannot be any greater than necessary to ensure

such compliance' and may not be so excessive as to be punitive in nature". Jove Engineering, Inc. at 1558. However, in addressing the Bankruptcy Court's statutory contempt authority, the Eleventh Circuit concluded that under 11 U.S.C. §105, the bankruptcy court could issue punitive damage awards:

> Section 105(a) states "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a) (emphasis added). ... Section 105 uses the broad term "any" which encompasses all forms of orders including those that award monetary relief. The term "any" should be given this broad construction under the "settled ruled that a statute must, if possible, be construed in such fashion that every word has some operative effect" United States v. Nordic Village, 503 U.S. 30, 36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992). The broad term "any" is only limited to those orders that are "necessary or appropriate" to carry out the Bankruptcy Code. Therefore, the plain meaning of §105(a) encompasses any type of order, whether injunctive, compensatory or punitive, so long as it is "necessary or appropriate to carry out the

> provisions" of the Bankruptcy Code. Jove Engineering, Inc. at 1554.

In In Re Ragar, 3 F.3d 1174 (8th Cir. 1993), the Eighth Circuit was presented with the issue of whether a bankruptcy court has the authority to issue an order of criminal contempt. The facts of the case were that an attorney violated a court order which barred him from representing the debtor. The bankruptcy court held the attorney in criminal contempt since he continued to represent the debtor and file pleadings on her behalf after the bankruptcy court's initial order. The bankruptcy court assessed a fine of $950 and further held that:

> [t]his order of contempt shall become effective as a final order ten days after service of the order on Brown unless, within the ten-day period, Brown serves and files with the bankruptcy clerk an objection to this order of contempt as provided by Federal Rule of Bankruptcy Procedure 9033(b).
>
> If an objection is filed, this Order shall be subject to review by the District Court

pursuant to Federal Rule of Bankruptcy Procedure 9003. In Re Ragar at 1177.

Citing the plain meaning of the statute, the Eighth Circuit concluded that 11 U.S.C. §105 authorized at least as much as was done in that proceeding. However, the Eighth Circuit in the present case determined that Bankruptcy Courts do not have the authority to issue punitive awards.

The Fifth Circuit reached a completely different conclusion. In Matter of Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990) the Fifth Circuit concluded that: "Bankruptcy Courts have no inherent or statutory power and none is granted them by 11 U.S.C. Section 105 or by 28 U.S.C. Section 157 or by Rule 9020 - to preside over Section 401(3) criminal contempt trials for violation of bankruptcy court orders or to acquit, convict or sentence for such offenses." Matter of Hipp, Inc. at 1521.

In addition to the confusion over whether bankruptcy courts have the authority to issue punitive awards under 11 U.S.C. §105, there is also uncertainty and conflict among the various Circuit Court of Appeal decisions which address the question of whether Bankruptcy Courts have the authority to issue orders and damage judgments for civil contempt. See for example, In Re Skinner, 917 F.2d 444 (10th Cir. 1990) (holding that 11 U.S.C. Section 105(a) grants bankruptcy courts civil contempt power and that this jurisdictional grant is constitutional); In Re Walters, 868 F.2d 665 (4th Cir. 1989) (holding that Congress has authorized Bankruptcy Courts' civil contempt power and that this authorization is not a violation of separation-of-powers); In Re Sequoia Auto Brokers, Ltd., 827 F.2d 1281 (9th Cir. 1987) (holding that Congress did not authorize bankruptcy court jurisdiction over civil contempts); In Re Pace, 67 F.3d 187

(9th Cir. 1995) (holding that a trustee can recover damages in the form of costs and attorney's fees under Section 105(a) as a sanction for ordinary civil contempt).

CONCLUSION

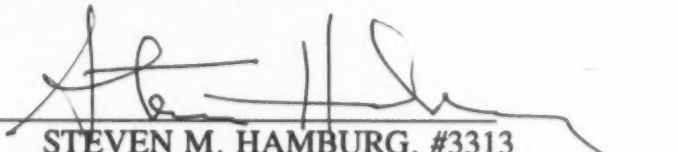
In conclusion, the Petitioner submits that this proceeding raises very important issues related to the automatic stay provisions of 11 U.S.C. §362. The automatic stay provisions provide one of the central procedural mechanisms necessary to provide debtors with a fresh start and to allow trustees to administer on a debtor's assets for the benefit of all creditors. There are conflicting decisions among the Circuit Courts of Appeal as to the authority of the Bankruptcy Courts to enforce the automatic stay provisions. There is a conflict with respect to the Bankruptcy Courts' authority under 11 U.S.C. §362(h), as applied to corporate debtors, and a conflict with respect to the Bankruptcy Courts' authority under 11 U.S.C. §105 as

it relates to civil and criminal contempt powers. The Petitioner believes that the facts of this proceeding present the United States Supreme Court with a good opportunity to provide clarification and resolve the conflicting authority.

Wherefore, the Petitioner respectfully requests that this Court issue a writ of certiorari to review the March 13, 1997 Order of the United States Court of Appeals for the Eighth Circuit entered in Cause No. 96-2078.

Respectfully submitted

SUMMERS, COMPTON, WELLS & HAMBURG
PROFESSIONAL CORPORATION

By 

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(2)

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No. _____

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1996

DAVID A. SOSNE, TRUSTEE,

Petitioner,

V.

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

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65 pp

No. _____

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1996

DAVID A. SOSNE, TRUSTEE,

Petitioner,

V.

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Respondent.

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2078

In Re: Just Brakes Corporate Systems, Inc.,	*	
Debtor.	*	
David A. Sosne, Trustee,	*	
Plaintiff – Appellee.	*	Appeal from the United States District Court for
v.	*	the Eastern District of Missouri.
Reinert & Duree, P.C.; Gary Robbins; Robbins & Associates, Inc.; Estes & Estes, Inc.; James C. Landes,	*	
Defendants – Appellants.	*	

Submitted: December 11, 1996

Filed: March 13, 1997

Before FAGG, FLOYD R. GIBSON, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Appellants are judgment creditors of a Chapter 7 bankruptcy debtor, Just Brakes Corporate Systems, Inc. ("Just Brakes" or "debtor"). They appeal an order awarding Trustee David A. Sosne $100,717 in damages for appellants' willful violation of the automatic stay. See 11 U.S.C. § 362. We agree that appellants violated the automatic stay but conclude that the damage award was an improper remedy and therefore reverse.

I. Background

In 1988, appellants obtained a state court judgment against Just Brakes for $104,583.33. In January 1991, Just Brakes assigned its only valuable asset, a registered trademark, to FGR Management, Inc. ("FGR"). Appellants promptly attacked the transfer as a fraudulent conveyance. The state court agreed, enjoined Just Brakes and FGR from further transfers, and scheduled a foreclosure sale of the trademark to satisfy appellants' judgment. Five minutes before that sale, Just Brakes petitioned for Chapter 11

protection and asserted its own claim to recover the trademark. The foreclosure sale was cancelled.

Appellants persuaded the bankruptcy court to dismiss the Chapter 11 case as "essentially a single asset reorganization case." In dismissing, the court observed that Just Brakes's claim to avoid its pre-petition assignment of the trademark to FGR "is an asset of the Bankruptcy estate," and that the rights of Just Brakes and others asserting claims to the trademark could be adequately protected at less cost in state court.

The parties then returned to state court, and the court scheduled a foreclosure sale of the trademark at noon on October 15, 1991. That morning, Just Brakes filed this Chapter 7 petition. Though notified of the filing, the state court allowed the sale to proceed, ordering that its proceeds be held in escrow while the parties "exhausted their legal remedies contesting the validity of the . . . sale, or until

further order of court."[1] Nine days later, in the action here at issue, appellants applied to the state court and were granted pay-out of the net sale proceeds, $100,717, without obtaining relief from the Chapter 7 automatic stay.

One year later, the Trustee sued to recover the sale proceeds for the bankruptcy estate, attacking debtor's January 1991 assignment of the trademark as a fraudulent conveyance, see 11 U.S.C. § 548, and seeking damages from appellants for willful violation of the automatic stay. When appellants demanded a jury trial of the avoidance issues, the Trustee dismissed that claim, and the district court remanded the case to the bankruptcy court for resolution of the "core" automatic stay issues.

The bankruptcy court granted summary judgment in favor of the Trustee. It found a violation of the automatic stay because appellants applied the trademark proceeds to their pre-petition judgment, knowing that debtor had asserted

[1] No one challenged the state court's decision to complete the foreclosure sale, doubtless because the sale proceeds exceeded the value debtor

a claim to recover that asset. Turning to the question of remedy, the court concluded that it may award "[c]ompensation and punishment" for willful violation of the automatic stay in a contempt proceeding, and may also award money damages under its broad §105 (a) power to issue "necessary or appropriate" orders. It awarded as the "appropriate measure" of damages the $100,717 appellants received from the foreclosure sale. The district court affirmed. Appellants challenge the decision that they violated the automatic stay and the damage award.

II. Violation of the Automatic Stay

Appellants argue that they did not violate the automatic stay when they collected the foreclosure sale proceeds because Just Brakes transferred its entire interest in the trademark in January 1991, and state law does not allow the transferor to avoid a fraudulent conveyance. Acknowledging that the Trustee asserts a claim to recover the trademark for the Chapter 7 estate, appellants argue that

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placed on the trademark in its Chapter 7 schedules.

claim is neither "property of the estate" nor "property of the debtor" within the meaning of §§ 362 (a) (2) - (5) *until the Trustee has actually recovered the property*. Thus, the Trustee's only remedy is to enjoin appellants' collection efforts under §105 (a) of the Code, as was done in Celotex Corp. v. Edwards, 115 S.Ct. 1493, 1498-1500 (1995).

The nature of debtor's present interest in the trademark is an interesting question[2] but one that we need not resolve because, by collecting the foreclosure sale proceeds, appellants violated § 362 (a) (6), which provides:

> [A] petition filed under . . . this title . . . operates as a stay . . . of (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

Here, the trademark was sold to satisfy appellants' pre-petition "claim against the debtor" – their 1988 judgment. After the sale, appellants applied to the state court and

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[2] We note that property of the bankruptcy estate is broadly defined in § 541 (a) (1) of the Code. See United States v. Whiting Pools, Inc., 462 U.S. 198, 204-205 & n.9 (1983). But the nature and extent of the debtor's interest in property is governed by state law. See Butner v. United States, 440 U.S. 48, 54-55 (1979).

received the sale proceeds out of escrow, clearly an "act to collect" on their judgment. See Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354, 356 (10th Cir. 1991). This act prejudiced the Trustee's ability to litigate a competing avoidance claim on behalf of all creditors and was therefore inconsistent with the basic purpose of the automatic stay, "to prevent creditors from stealing a march on each other." Brown v. Armstrong, 949 F.2d 1007, 1010 (8th Cir. 1991) (quotation omitted).[3] The bankruptcy court correctly concluded that appellants violated the automatic stay.

III. The Appropriate Remedy

The Trustee urged the bankruptcy court to award money damages under § 362 (h), which provides that "[a]n individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and

[3] This factor distinguishes this case from cases holding that § 362 (a) (6) does not automatically stay post-petition acts to collect creditors' *independent* claims against debtors' guarantors. See In re Alcom Corp., 154 B.R. 97, 115-116 (Bankr. D.D.C. 1993) (subsequent history

attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The bankruptcy court ruled that §362 (h) only applies to "individual" debtors, not to corporate entities such as Just Brakes. We agree.[4] As the Second Circuit persuasively explained, this construction of § 362 (h) is required by the plain meaning of the word "individual," as used in the Bankruptcy Code, supported by the fact that § 362 (h) was added to the Code as part of the "Consumer Credit Amendments" of 1984. See In re Chateaugay Corp., 920 F.2d 183, 186-87 (2d Cir. 1990); accord In re Goodman, 991 F.2d 613, 619 (9th Cir. 1993); In re Calstar, Inc., 159 B.R. 247, 260 Bankr. D. Minn. 1993). We reject earlier, contrary circuit decisions that did not give adequate weight to the statute's plain meaning. See In re Atl. Bus. & Community Corp., 901 F.2d 325, 329 (3d Cir.

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omitted); In re Advanced Ribbons & Office Prods., Inc., 125 B.R. 259, 265 (B.A.P. 9th Cir. 1991).

[4] This court has not previously addressed the issue. In Lovett v. Honeywell, 930 F.2d 625 (8th Cir. 1991), we assumed that § 362 (h) damages could be awarded to a corporate debtor and affirmed the denial of damage relief.

1990); Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir. 1986).

Having denied the Trustee § 362 (h) damages, the bankruptcy court went on to conclude that it may compensate *and punish* for a willful violation of the automatic stay under its inherent contempt powers, or its broad § 105 (a) power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." But the power to punish for a statutory violation is a criminal law power. It must be expressly conferred by Congress, and its exercise is often subject to the procedural safeguards that protect the criminally accused. Even the judicial power to punish for criminal contempt of a court order is carefully distinguished from the power to remedy a violation of that order through civil contempt. See, e.g., Shillitani v. United Sates, 384 U.S. 364, 368-72 (1966); Combs v. Ryan's Coal Co., 785 F.2d 970, 981 (11th Cir.), cert. denied, 479 U.S. 853 (1986). We conclude that Congress has conferred no power to punish for

a violation of § 362 (a), other than the punitive damage authority in § 362 (h).

On the other hand, we agree that bankruptcy courts have broad equitable powers to remedy violations of the automatic stay that injure a corporate debtor's estate. Many courts have said that those who violate the automatic stay "may be held in contempt." In re Computer Commun., Inc., 824 F.2d 725, 731 (9th Cir. 1987). Calling this remedial power contempt overlooks a serious question whether bankruptcy courts have contempt powers after the 1984 Amendments. Compare In re Sequoia Auto Brokers, Ltd., 827 F.2d 1281, 1290 (9th Cir. 1987), with In re Skinner, 917 F.2d 444, 448-50 (10th Cir. 1990). More narrowly, it overlooks the fact that contempt is a remedy for violating court orders, not statutes. See In re Calstar, 159 B.R. at 257-58. Finally, even if a civil contempt power exists, we see little if any need to resort to it in this context because § 362 (a), buttressed by § 105 (a), confers broad equitable power to remedy adverse effects of automatic stay violations. See

Celotex, 115 S.Ct. at 1498-99 & n.6; In re Taco Ed's, Inc., 63 B.R. 913, 931-32 (Bankr. N.D. Ohio 1986).

Having limited the scope of the bankruptcy court's remedial powers, we encounter a problem with the remedy awarded in this case, for neither the bankruptcy court nor the district court clarified whether the damages awarded[5] were compensatory or punitive. Thus, we must examine whether the bankruptcy court's award – the "value of the voidable transfer that resulted from the violation of the automatic stay" –was properly compensatory.

The bankruptcy court relied upon In re Calstar in awarding the Trustee the value of the trademark as determined by the foreclosure sale. But in Calstar, the bankruptcy court held that the assets in question were part of the debtor's estate *before* ruling that their value was the appropriate remedy for violation of the stay. See 159 B.R. at 252-53. Here, by contrast, the Trustee has never established

his right to avoid debtor's pre-petition transfer and recover the trademark or its value for the estate. Indeed, the Trustee dismissed his adversary avoidance claims so that he could pursue this § 362 claim in the bankruptcy court. Thus, the value of the trademark is not an appropriate compensatory remedy. At this stage of the proceedings, the Trustee's rights are preserved if appellants are ordered to pay the foreclosure sale proceeds (including interest on the proceeds from October 24, 1991) into escrow pending determination of whether those proceeds now belong to appellants, or to debtor's estate.

In making its damage award, the bankruptcy court observed that appellants' violation of the automatic stay "required the Trustee to incur the additional expense of litigating these actions." But the court made no effort to quantify this expense. In vacating the $100,717 award and substituting an order to pay the proceeds into escrow, we do

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[5] Damages are not an equitable remedy. Because Congress in § 362 (h) did not grant authority to award damages to corporate debtors, only

not foreclose the bankruptcy court from returning to the question of remedy after the avoidance issues are finally resolved. For example, if the Trustee proves that the trademark proceeds belong in the debtor's estate, then the appellants' violation of the automatic stay has needlessly cost the estate delay and litigation expense. On the other hand, if the Trustee fails to prove his avoidance claim, then the Trustee has pursued a lost cause, and the expense he incurred is a self-inflicted wound.

For the foregoing reasons, the district court's March 29, 1996, order is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

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compensatory equitable remedies are appropriate.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)
	)
JUST BRAKES CORPORATE SYSTEMS, INC.,	) Adv. No. 92-4384-172
Debtor,	)
	)
DAVID A. SOSNE, TRUSTEE,	) Case No. 91-46618-172
Plaintiff,	) CHAPTER 7 PROCEEDING
vs.	)
	)
REINERT & DUREE, P.C. n/k/a REINERT, DUREE & COLLINS, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ROBBINS & ROBBINS ASSOCIATES, INC., ESTES & ESTES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	) PUBLISHED
Defendants.	)

ORDER

At Saint Louis, in this District, this 11th day of July, 1994.

The matters being considered here are the several pretrial requests filed by the Trustee/Plaintiff and by the several Defendants. For the purposes of this Order, the matters have been grouped together as follows:

1. Plaintiff's Amended Motion for Summary Judgment (Document No. 24); Plaintiff's Memorandum in Support of Summary Judgment (Documents No. 30 and 31); Affidavit in Support of Summary Judgment (Document No. 29); Plaintiff's Memorandum in Opposition to Amended Motion for Summary Judgment (Document No. 37).

2. Defendants' "Jury Demand, Motion to Withdraw Reference to the Bankruptcy Court, and Answer to the Amended Complaint" (Document No. 25); Plaintiff's Motion for Sanctions (Document No. 33); Defendants' Response to Plaintiff's Motion for Sanctions (Document No. 38); Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Sanctions (Document No. 40).

3. Plaintiff's Motion for Summary Judgment (Document No. 35); Plaintiff's Memorandum in Support of Summary Judgment (Document No. 36); Defendants' Response in Opposition to Plaintiff's Summary Judgment (Document No. 39).

This Adversary Proceeding is based upon the Chapter 7 Trustee's Amended Complaint to Enforce the Stay and to Assess Damages for Willful Violation of the Stay, filed on March 29, 1994. The Trustee is also a Plaintiff in a lawsuit pending before the United States District Court for the Eastern District of Missouri. Some of the Defendants here are Defendants in the District Court lawsuit which concerns allegedly fraudulent or preferential transfers of a trademark. In general, this Adversary Proceeding and the District Court lawsuit address different portions of the continuing series of activities involving the transfer of the Debtor's trademark.

This is a core proceeding pursuant to Section 157 (b) (2) (A), (G) and (O) of Title 28 of the United States Code. The Court has jurisdiction over the parties and this matter

pursuant to 28 U.S.C. Sections 151, 157 and 1334, and Rule 29 of the Local Rules of the United States District Court for the Eastern District of Missouri.

On consideration of the record as a whole, the Court announced its determinations and orders from the bench to the Attorneys for the Plaintiff and the Defendants at a pretrial conference on July 6, 1994.

The Plaintiff's Amended Complaint alleges that after the Debtor filed its Chapter 7 Petition on October 15, 1991, and with actual knowledge of the filing, the Defendants willfully and intentionally continued their efforts to collect a prepetition, non-bankruptcy court judgment. These postpetition efforts included a Sheriff's sale of the Debtor's service mark, trademark and trade name "Just Brakes" and the associated goodwill and all other assets of Just Brakes Corporate Systems, Inc.; prosecution of a request for an order of pay-out of the proceeds of the sums received at the Sheriff's sale; receipt of these sums in the amount of $100,717.00; and application of these sums in satisfaction of

a prepetition debt. The Plaintiff has argued further that the basis for this series of postpetition collection activity is a transfer which occurred when the Defendants obtained the nonbankruptcy court order that directed the Sheriff to levy and seize upon the Debtor's personal property. This transfer is the subject of the Plaintiff's avoidance lawsuit in the District Court.

In an earlier Chapter 11 case in which this Debtor was a Debtor-In-Possession, the Bankruptcy Court entered an order that concluded in part that

> "... the Debtor held and continues to hold an interest in the trademark which is its claim for the avoidance of the pre-petition [Chapter 11] assignment to [another entity]. This claim is an asset of the [Chapter 11] Bankruptcy estate.

In re Just Brakes Corporate Systems, Inc., Case No. 91-44835-172, Motions A, C and D, Document No. 34, September 24, 1991.

Although the Chapter 11 case was dismissed on or about September 24, 1991, the Debtor's claim for the

avoidance of the prepetition (Chapter 11) assignment of the trademark survived to the extent that recovery was also available under nonbankruptcy law.

As of the commencement of this Chapter 7 case on October 15, 1991, the Debtor's estate included its claims for the avoidance of the assignment of the mark, as well as any new Chapter 7 claim for avoidance such as those pleaded in the District Court action. These claims are property of the Bankruptcy estate. 11 U.S.C. Section 541.

Pursuant to 11 U.S.C. Section 362(a), the petition filed in this matter operates as a stay of the enforcement against property of the estate of a judgment obtained before the commencement of the case; as a stay of any act to obtain possession of property of the estate from the estate or to exercise control over property of the estate; as a stay of any act to perfect or enforce any lien against property of the estate; as a stay of any act to perfect or enforce against property of the debtor any lien to the extent that such lien secures a prepetition claim; and any act to collect, assess, or

recover a claim against the debtor that arose before the commencement of the case.

The Defendants' postpetition actions with respect to the sale of the trademark and the interests therein of the Debtor and of the Bankruptcy estate, the collection of the proceeds, and the application of the proceeds to the prepetition debt were in violation of the automatic stay. The Defendants have not been granted relief from the automatic stay in this case. **See In re Abrams**, 127 B.R. 239 (9th Cir. BAP 1991).

A court is to render judgment forthwith on a motion for summary judgment, if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure, made applicable here by Rule 7056, Federal Rules of Bankruptcy Procedure. The Court has determined that on the allegation that the Defendants violated the

automatic stay, the Plaintiff is entitled to judgment on his motion for summary judgment. **See Sartor v. Arkansas Natural Gas Corp.**, 321 U.S. 620 (1944).

In these pleadings, and in the answer to the amended complaint, the Defendants have denied that they willfully violated the automatic stay. The Plaintiff's request for a money judgment is based upon the allegation that the Defendants willfully violated the automatic stay. Therefore, there is a genuine issue as to material facts, and neither party is entitled to judgment on their motions for summary judgment on this issue.

The narrow issue of whether or not the Defendants' violation of the automatic stay was willful may be determined in a bench trial in the Bankruptcy Court on the Plaintiff's amended adversary complaint. This issue is not one to which the parties are entitled to a trial by jury. It is, therefore, possible that this issue might be tried on the limited questions of willfulness and damages without

invading the matters that are pending before the United States District Court in the jury trial matter.

It has been suggested, however, that a more comprehensive disposition of these matters would result from a procedure that allowed the jury trial to be concluded before these issues are tried in the Bankruptcy Court. Such an approach might be a more efficient use of judicial resources if not all of the issues can be finally determined in this Court. The parties have been directed to attempt to resolve all outstanding matters as part of global settlement. If such attempts are unsuccessful, the parties are to return to this Court at the hearing set herein and suggest a procedure that will be in the best interests of all parties.

IT IS ORDERED that these pretrial matters are concluded; and

That to the extent that these matters have not previously been ruled upon, the Plaintiff's motion for leave to file an amended complaint (Motion 27) is granted; and

That the Defendants' Motion for Summary Judgment (Motion No. 31) and Amended Motion for Summary Judgment (Motion 24) are denied; and

That further action on the Defendants' Motion to Withdraw the Reference of this Adversary Proceeding (Motion 25) shall be stayed pending the parties' announcements at the continued pretrial hearing; and that the matter shall remain in the Bankruptcy Court until said hearing; and

That the Plaintiff's Motion for Summary Judgment (Motion 35) is granted in part; and that on the Plaintiff's Amended Complaint, judgment is entered in part for the Plaintiff and against the Defendants; and that Defendants' actions after the commencement of this case as described in the Amended Complaint were in violation of the automatic stay of 11 U.S.C. Section 362; and that said Motion for Summary Judgment is denied as to the remaining issues which are to be determined at trial; and

That the determination of the Plaintiff's Motion for Sanctions is passed for such other and further proceedings as may be required; and

That this matter is continued and reset for **September 6, 1994 at 10:00 a.m. in Bankruptcy Courtroom No. 1, U.S. Bankruptcy Court, Eastern District of Missouri, One Metropolitan Square, 211 North Broadway, 7th Floor, St. Louis, Missouri** as a continued pretrial hearing

JAMES A BARTA
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	Adv. No. 92-4384-172
Debtor,	)	
	)	
DAVID A. SOSNE, TRUSTEE,	)	Case No. 91-46618-172
Plaintiff,	)	CHAPTER 7 PROCEEDING
vs.	)	
	)	
REINERT & DUREE, P.C. n/k/a REINERT, DUREE & COLLINS, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	)	PUBLISHED
Defendants.	)	

ORDER

At Saint Louis, in this District, this 30th day of November, 1994.

On consideration of the record as a whole, and consistent with the determinations set out in the Memorandum entered in this Adversary Proceeding

IT IS ORDERED that this matter is concluded; and that this Order is the Final Order of the Bankruptcy Court in this Adversary Proceeding; and

That the motion for summary judgment, dated April 15, 1994, on behalf of David A. Sosne, Trustee/Plaintiff ("Plaintiff") is sustained; and that the motion for summary judgment, filed on March 29, 1994, on behalf of Reinert, Duree, P.C. n/k/a Reinert, Duree & Collins, P.C., Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc., and James C. Landes, ("Defendants") is overruled; and

That judgment on the Plaintiff's Amended Complaint is entered in favor of the Plaintiff and against the Defendants jointly and severally; and that as and for judgment in this matter, the Defendants are to pay to the Plaintiff the sum of $100,717.00, for the willful violation of the automatic stay, pursuant to Sections 105(a) and 362 of Title 11 of the United

States Code, and that unless otherwise specifically ordered to the contrary, all other requests in this proceeding are denied; and that the Defendants' requests to withdraw the reference of this matter are deemed withdrawn.

_____

JAMES J. BARTA
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	Adv. No. 92-4384-172
Debtor,	)	
	)	
DAVID A. SOSNE, TRUSTEE,	)	Case No. 91-46618-172
Plaintiff,	)	CHAPTER 7 PROCEEDING
vs.	)	
	)	
REINERT & DUREE, P.C. n/k/a REINERT, DUREE & COLLINS, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	)	PUBLISHED
Defendants.	)	

MEMORANDUM

At Saint Louis, in this District, this 30th day of November, 1994.

This Memorandum addresses the Trustee's Motion for Summary Judgment dated September 19, 1994, and the

Defendants' Motion for Summary Judgment filed on October 6, 1994. The determinations and orders in this matter are entered after a consideration of the record as a whole.

This Adversary Proceeding is based upon an Amended Complaint to Enforce the Stay and to Assess Damages for Willful Violation of the Automatic Stay, filed by the Chapter 7 Trustee on March 29, 1994. This Adversary Proceeding and a District Court Jury Trial Proceeding addressed different portions of a continuing series of activities involving the transfer of the Debtor's trademark.

On July 11, 1994, the Bankruptcy Court entered an Order that decided a number of contested pretrial requests that had been filed by the Trustee/Plaintiff and by the several Defendants in this Adversary Proceeding. In part, the Court determined that the Defendants had violated the automatic stay of Section 362 of Title 11 of the United States Code. For the purpose of considering these Motions for Summary Judgment, the Findings, Conclusions and Orders set out in

the Order dated July 11, 1994 are incorporated and adopted herein as though fully set forth. An issue that could not be decided in the earlier pretrial matters was whether or not the Defendants' violation of the automatic stay was willful. This determination was deferred until after either a bench trial in the Bankruptcy Court on the Plaintiff's Amended Complaint, or upon some other mechanism as may be agreed upon by the parties. The parties have elected to submit the entire Adversary Proceeding and all unresolved issues to the Bankruptcy Court in the form of the Motions for Summary Judgment, without a further Court hearing or trial.

A brief review of the pertinent facts is helpful to this determination. On September 28, 1988, the Defendant, Reinert, Duree & Crane, P.C., on behalf of the other Defendants named in this Adversary Proceeding, recovered a judgment against the Debtor in the principal sum of $133,083.33 in the Circuit Court of St. Louis County, Missouri. On July 30, 1991, the Debtor filed a Petition for Reorganization under Chapter 11 of the Bankruptcy Code

(the first bankruptcy case). This Petition was filed five minutes prior to a Sheriff's sale of the Debtor's trademark pursuant to an order entered by a nonbankruptcy court. The filing of the petition under Chapter 11 operated as a stay of all collection activity on prepetition debt, including the Defendants' judgment, pursuant to 11 U.S.C. § 362.

At the conclusion of a hearing on September 23, 1991, the Bankruptcy Court granted a motion filed on behalf of these Defendants, and dismissed the Chapter 11 case based upon a determination that further operations under Chapter 11 would result in a continuing loss to or diminution of the estate. A copy of the Court's written Order dated September 24, 1991 is attached hereto as Exhibit A. As part of the Findings and Conclusions in the first bankruptcy case, the Court determined that

> As of the commencement of this [Chapter 11] case, the Debtor held and continues to hold an interest in the trademark which is its claim for the avoidance of the prepetition [Chapter 11] assignment to [another corporate entity]. This claim is an asset of the [Chapter 11] bankruptcy estate.

In re Just Brakes Corporate Systems, Inc., Case No. 91-44835-172, Motions A, C and D, Document No. 34, pp. 3-4, September 24, 1991. A copy of this Order was mailed to the parties who are Defendants in this Adversary Proceeding.

After dismissal of the first Bankruptcy case, the nonbankruptcy court directed that a sale of the Debtor's assets be conducted at 12:00 Noon on October 15, 1991, to satisfy the Defendants' judgment. The Debtor filed the Chapter 7 petition that commenced this case at 9:12 a.m. on October 15, 1991. A file-stamped copy of the voluntary petition was faxed to the Defendants' law firm prior to the 12:00 p.m. foreclosure on October 15, 1991. **Affidavit of Nathan S. Cohen, Attorney at Law, Exhibit C, Trustee's Memorandum in Support of his Motion for Summary Judgments, Document No. 46, filed September 12, 1994, Case No. 91-46618-172, pp. 1-2.** Other members of the Defendants' law firm were given oral notice of the

commencement of the Bankruptcy case approximately fifty minutes after the Chapter 7 petition was filed. **Deposition of Robert West, Exhibit D, Trustee's Memorandum in Support of his Motion for Summery Judgement, Document No. 46, filed September 19, 1994, Case No. 91-46618-172, pp. 8-11, 13-15**.

The filing of the Chapter 7 petition operated as a stay of collection activity on prepetition debt.

The nonbankruptcy court ordered that the sale of the Debtor's assets was to go forward on the condition that the sale proceeds were to be held in escrow until the parties had exhausted their legal remedies contesting the validity of the October 15, 1991 sale, or until further order of court. **Exhibit E, Trustee's Memorandum In Support of his Motion for Summary Judgment, Document No. 46. filed September 19, 1994, Case No. 91-46618-172. p. 1**. The nonbankruptcy sale generated gross proceeds in the amount of $105,000.00.

On October 24, 1991, without having requested relief from the automatic stay, the Defendants sought and obtained a nonbankruptcy court order that directed the payout of the net sale proceeds to the Defendants. **Exhibits G and H, Trustee's Memorandum in Support of his Motion for Summary Judgment, Document No. 46, filed September 19, 1994, Case No. 91-46618-172**. A member of the law firm that is a Defendant here admitted that he had been aware of the Bankruptcy filing at some time prior to October 24, 1991. **Deposition of David M. Duree, July 22, 1994, Exhibit I Trustee's Memorandum in Support of his Motion for Summary Judgement, Document No. 46, filed September 19, 1994, Case No. 91-46618-172, p. 41**. The net amount of the sale proceeds received by the Defendants was $100,717.00.

On September 18, 1992, the Trustee commenced this Adversary Proceeding to enforce the automatic stay and for other relief. On July 11, 1994, the Bankruptcy Court sustained the Trustee's Motion for Summary Judgment in

part, finding that in the Chapter 7 case, the Defendants had violated the automatic stay.

> The Defendants' postpetition actions with respect to the sale of the trademark and the interests therein of the Debtor and of the Bankruptcy estate, the collection of the proceeds, and the application of the proceeds to the prepetition debt were in violation of the automatic stay. **Sosne v. Reinert & Duree, et al.**, Adversary No. 92-4384-172, Order dated July 11, 1994, Document No. 41.

The issue of the willfulness of the Defendants' actions was passed for later determination, and has now been submitted to the Court as part of the Motions for Summary Judgment. For purposes of this determination, the Bankruptcy Court need not decide the questions presented in the Trustee's lawsuit to set aside and recover the transfers under Sections 547 or 548 of Title 11.

A violation of the automatic stay is willful if a creditor acts deliberately with knowledge of the Bankruptcy petition. **Knaus v. Concordia Lumber Co. Inc.**, 889 F.2d 773 (8th Cir. 1989); **In re Burke**, 147 B.R. 955 (Bankr.

W.D.Mo. 1992). The Defendants in this case had actual knowledge of the commencement of this Chapter 7 case. The Defendants also knew that there had been a judicial determination that the Debtor had an interest in the trademark. Facts and circumstances existed at the commencement of this case which would alert an attorney to the conclusion that the trademark and the proceeds of the sale of the trademark were part of a bankruptcy estate, and that the estate held a claim as described in the Court's previous Order. **Burke**, 147 B.R. at 958.

The Bankruptcy Court finds and concludes that the Defendants' actions in violating the automatic stay of Section 362 were willful.

Actions taken in violation of the automatic stay are at least voidable. **In re Raymark Indus. Inc.**, 973 F.2d 1125, 1131 (3rd Cir. 1992); **In re Schwartz**, 954 F.2d 569, 571 (9th Cir. 1992); **Interstate Commerce Comm'n v. Holmes Transp., Inc.**, 931 F.2d 984, 987 (1st Cir. 1991).

In this matter, the Trustee has requested a money judgment in the amount of $105,000.00 pursuant to 11 U.S.C. § 362(h) which permits an individual injured by any willful violation of a stay provided by Section 362 to recover actual damages and, in appropriate circumstances, punitive damages. This remedy is not available to a corporate entity. **See Johnston Environmental Corp. v. Knight,** 991 F.2d 613, 619 (9th Cir. 1993); **In re Chateaugay Corp.**, 920 F.2d 183, 186 (2d Cir. 1990); **In re U.S. Abatement Corp.**, 150 B.R. 381 (Bankr. E.D.La. 1993); **In re Calstar, Inc.**, 159 B.R. 247 (Bankr. D.Minn. 1993). In this case, the Trustee is not acting in his individual capacity, but rather on behalf of the Bankruptcy estate of a corporate entity. Therefore, relief in the form of a money judgment to an individual under Section 362(h) is not available to the Trustee.

Nonetheless, an aggrieved entity is generally not without a remedy before a court of equity. Pursuant to 11 U.S.C. § 105(a), the Court may issue any order that is necessary or appropriate to carry out the provisions of Title

11. In the circumstances presented here, the Trustee, on behalf of the Bankruptcy estate, is entitled to a judgment against the Defendants based upon the Defendants' willful violation of the automatic stay. Compensation and punishment for willful violation of the automatic stay may also be awarded in a contempt proceeding; but such a proceeding is not the exclusive relief available to a trustee.

A Chapter 7 trustee is charged with the responsibility of liquidating the assets of a bankruptcy estate for the benefit of creditors. See 11 U.S.C. § 704. The Defendants' willful violation of the automatic stay has not only prevented the Trustee from liquidating the asset, but it has also required the Trustee to incur the additional expense of litigating these actions. Therefore, a money judgment in favor of the Trustee is necessary to carry out the provisions of Title 11.

An appropriate measure of the amount of the money judgment here is the value of the voidable transfer that resulted from the violation of the automatic stay. As a result of their postpetition collection activity in violation of the

automatic stay, the Defendants received the amount of $100,717.00 (representing the gross sale proceeds less the Sheriff's commission). The Trustee, therefore, is entitled to a judgment against these Defendants in the amount of $100,717.00. See. Calstar, 159 B.R. 247.

The Defendants have argued that creditors of the current bankruptcy estate include only the individuals who managed the entity against which the prepetition judgment was obtained, and the attorneys and other parties.[1] Thus, according to the Defendants, a money judgment in this Adversary Proceeding would ultimately transfer money to the parties who assisted the Debtor in committing the acts that were the basis for the Defendants' judgment. However, these allegations may be presented as objections to the claims pursuant to 11 U.S.C. § 502, or by some other means,

[1] Although no claims bar date has been set, a review of the Court file has revealed that a proof of claim has been filed on behalf of each of the following creditors: IRS in the amount of $5,000.00; Southwestern Bell Yellow Pages in the amount of $24,244.12.

but are not ripe for a determination in this Adversary Proceeding.

One of the most powerful protections available to a Chapter 7 Debtor is that afforded by the automatic stay of section 362. It is intended to temporarily suspend collection activity, and to allow the trustee to identify and liquidate assets of the estate. The proceeds of the liquidation are then to be distributed equitably to **all** holders of allowed claims, *pro rata* if necessary, according to the priorities established by the Bankruptcy Code. A violation of the automatic stay frustrates this scheme, disturbs the orderly distribution of assets, and in some instances forever removes an asset from administration by a bankruptcy trustee. The trustee has the obligation to attempt to reimpose the balance and impartiality that results from a willful violation of the stay.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable here by Rule 7056, Federal Rules of Bankruptcy Procedure, summary judgment is appropriate if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. As presented here, there is no genuine issue as to any material fact, and the Plaintiff is entitled to a judgment as a matter of law.

As part of this Adversary Proceeding the Plaintiff had filed two motions for sanctions, arguing that he is entitled to recover attorneys' fees and costs incurred as a result of the Defendants refiling a jury demand and a motion to withdraw the reference; and fees and costs incurred in defending against the Defendants' motion for summary judgment, all after similar motions and requests had been denied by various courts. The number of requests, replies, memoranda and other documents that has been filed in these adversary proceedings has been large compared to similar proceedings in the bankruptcy court. Some of the later requests and responses appear to duplicate or restate requests or responses that had been previously determined. Partially as a result of

the uncertainty that continued to exist with respect to the extent of the Bankruptcy Court's jurisdiction prior to enactment of the Bankruptcy Reform Act of 1994, the Defendants' requests here generally did not insist upon a position after it was no longer tenable. Although many of the Defendants' arguments could have been presented more succinctly, and some should have been raised more promptly, it cannot be said that in defending their legal position, they acted in bad faith.

The unfortunate result of these actions is that the administration of a Chapter 7 case has been delayed and the expenses of administration have been increased. The overall consequence may be that little or no distribution will be available for general creditors. The Plaintiff's two motions for sanctions will be denied. The Plaintiff's Motion for Summary Judgment will be sustained and a money judgment will be entered against the Defendants.

JAMES J. BART
U.S. Bankruptcy Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re: JUST BRAKES CORPORATE SYSTEMS	)	
Debtor.	)	
DAVID A. SOSNE, TRUSTEE	)	
Plaintiff/Appellee,	)	No. 4:95 cv 226 SNL
vs.	)	
REINERT & DUREE, P.C., et al.,	)	
Defendants/Appellants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Reinert & Duree, P.C.'s (Reinert) appeal from the bankruptcy court's decision to grant summary judgment in favor of the bankruptcy trustee. Once a party is in bankruptcy, federal regulations impose an automatic stay that prohibits the collection of pre-bankruptcy judgments. Reinert collected on a pre-bankruptcy judgment against Just Brakes while an automatic stay was in force. The Court is presented with the question of whether this collection violated the stay and, if that is the

case, whether the bankruptcy court had authority to award damages for the willful violation.

On an appeal, the district court may affirm, modify, or reverse a judgment or order of the bankruptcy court. This Court may affirm the decision if it is supported by law and the facts contained in the record. Findings of fact will not be set aside unless clearly erroneous and witness credibility decisions will not be second-guessed. In re Van Horne, 823 F.2d 1285, 1297 (8th Cir. 1987); In re Martin, 761 F.2d 472, 474 (8th Cir. 1985). Under Bankruptcy Rule 8013, findings of fact are clearly erroneous when they are not supported by substantial evidence, contrary to the clear preponderance of the evidence, or based on an erroneous view of the law. In re Cook, 72 B.R. 976 (W.D. MO. 1987). Conclusions of law are subject to *de novo* review by this Court.

The facts of this case have been set out in the court below and need be only briefly revisited. The Appellant is the law firm of Reinert & Duree, P.C. On September 28, 1988, Reinert recovered a judgment in Circuit Court for the

City of St. Louis for $133,083.33 against the debtor, Just Brakes. After an initial Chapter 11 filing by Just Brakes was dismissed, the company refiled in Chapter 7. In the period between the dismissal of the Chapter 11 proceeding and the Chapter 7 proceeding, Reinert had petitioned the circuit court to order the sheriff to hold an auction. The circuit court ordered an auction but when they found out about the Chapter 7 filing, the court ordered the money from the sale to be put in escrow. On October 24, 1991, without requesting relief from the automatic stay, Reinert petitioned the circuit court to pay out the proceeds and Reinert received $100,717.00.

Following that disbursement, the Chapter 7 Trustee commenced a proceeding in bankruptcy court to enforce the automatic stay. The bankruptcy court found that Reinert violated the stay and made the additional finding that its violation was willful. The bankruptcy court ordered Reinert to pay back the $100,717.00 for willful violation of the

automatic stay pursuant to 11 U.S.C. § 105 (a) and 11 U.S.C. § 362.

The bankruptcy court found that there was no dispute that the sheriff's sale against Just Brakes was to satisfy the pre-petition judgment. The automatic stay provisions of § 362 are clear: "A petition filed under 310, 302, or 303 of this title . . . operates as a stay . . . of . . .the enforcement, against the debtor or against the property of the estate, of a judgment obtained before commencement of the case." Despite Reinert's misleading statements about the nature of the property that was sold, the Court finds no reason to disagree with the bankruptcy court on their finding.

The second challenge to the bankruptcy court's decision is the finding that the violation was willful. The Court approves the bankruptcy court's findings of fact regarding this issue. Reinert knew that the stay was in effect and acted deliberately to seek the pre-petition judgment funds. The legal standard for willfulness is clear: "A willful violation of the automatic stay occurs when the creditor acts

deliberately with knowledge of the bankruptcy petition." In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989). The Court finds that the bankruptcy court correctly applied this standard and awarded damages in the proper amount. An award of damages is proper because a court has inherent power to enforce its own orders; this stay operates in the same general manner. 11 U.S.C. 105 (a); In re Calstar, Inc., 159 B.R. 247, 260 (Bkrtcy.D.Minn. 1993).

Reinert's final argument is a false issue. They argue that they were entitled to a jury trial. Their actions, however, were in such clear violation of the law that the ruling on summary judgment meant that they were not entitled to any trial-jury or nonjury.

Accordingly,

IT IS HEREBY ORDERED that the ruling of the bankruptcy court is **AFFIRMED**.

Dated this 29th day of March, 1996.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2078EMSL

Reinert & Duree, P.C.,	*	
	*	
Appellants,	*	Order Denying Petition
	*	for Rehearing and
vs.	*	Suggestion for
	*	Rehearing En Banc
David A. Sosne,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 14, 1997

Order Entered at the Director of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2078EMSL

Reinert & Duree, et al.,	*	
	*	
Appellants,	*	Appeal from the United
	*	States District Court for
vs.	*	the Eastern District of
	*	Missouri
David A. Sosne,	*	
	*	
Appellee.	*	

The parties' motions to stay the mandate of this court are granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 5/27/97. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

April 24, 1997

Order Entered at the Director of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Mr. Steven M. Hamburg
SUMMERS & COMPTON
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St. Louis, MO 63124

Article III of the Constitution of the United States

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different

states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two

witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

11 U.S.C. § 105. Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest, may –

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that -

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title -

(i)sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under § 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

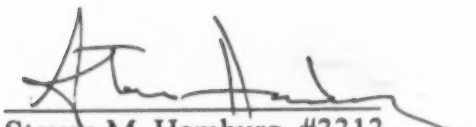
(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

* * *

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages,

including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.



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Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

(3)

No. 96-2045

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Petitioners,

v.

DAVID A. SOSNE, BANKRUPTCY TRUSTEE FOR JUST BRAKES CORPORATE SYSTEMS, INC., DEBTOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eight Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This petition is one of two petitions seeking a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The Respondent has heretofore filed its Petition for Writ of Certiorari (hereinafter referred to as "Respondent's Petition") in the proceeding styled *David A. Sosne, Trustee v. Reinert & Duree, P.C., et al.*, which has been assigned Cause No. 97-7 by this Court. The Respondent's Petition contains a concise statement of the case, setting forth the facts material to the consideration of the questions presented by the Eighth Circuit decision. To avoid repetition, this Court is respectfully referred to the Respondent's Petition filed in said related proceeding, and the Respondent will confine this brief to the separate questions raised by the Petitioners in this proceeding.

SUMMARY OF THE ARGUMENT

Contrary to the argument of the Petitioners, the decision below does not establish a rule "...that all parties are automatically barred from dealing in property in which neither the debtor nor the bankruptcy estate holds an interest..." Rather, the Eighth Circuit held that proceeding with a foreclosure action against the Debtor after the filing of a bankruptcy petition was a violation of the automatic stay provisions of 11 U.S.C §362. The decision of the Eighth Circuit for which the Petitioners seek a Writ of Certiorari is not in conflict with Celotex Corp. v. Edwards, 514 U.S. 300, 131 L. Ed. 2nd. 403, 115 S.Ct. 1493 (1995) and Edwards v. Armstrong World Industries, Inc., 6 Fd. 3rd. 312 (5th Cir. 1993).

ARGUMENT

The Petitioners have submitted to this Court that their collection activities were not against the Debtor because the Debtor, allegedly, did not have an interest in the property the Petitioners levied upon and caused to be sold. The facts of the case clearly reflect otherwise and the issue of whether or not the Debtor had an interest in the property levied upon is irrelevant since the Petitioners continued with an action against the Debtor which was based solely upon a claim against the Debtor, conduct directly proscribed by 11 U.S.C. §362(a).

The Petitioners obtained a judgment against the Debtor in state court. The Petitioners also obtained an order from the state court barring the Debtor from transferring the asset upon which the Petitioners sought to levy. After the Debtor filed its Chapter 7 bankruptcy proceeding, the Petitioners continued with their collection activities and orchestrated the state court sale of the asset in question. The Debtor was a party to the state court ordered sale and the Debtor's interest in the asset in question was sold as part of that sale. The Petitioners argue that at the time of the filing of the bankruptcy proceeding the only asset of the Debtor's estate was a claim to avoid the sale of the trademark. Petitioners ignore that it was continuing an action against the Debtor by proceeding with the sheriff's sale and obtaining the proceeds.

Even if the Debtor did not have any interest in the asset sold, it is clear that the Debtor was a party to the State Court proceeding and that the Petitioners were attempting to collect a judgment against the Debtor. The Petitioners' argument is based entirely upon the false premise that its collection activities were not against the Debtor since,

allegedly, the Debtor had no interest in the property being sold. The Petitioners argued to the Eighth Circuit that they did not violate the automatic stay when they collected the sale proceeds because the Debtor did not have an interest in the assets sold. The Eighth Circuit held that the nature of the Debtor's interest in the property was irrelevant because, by continuing with the sale against the Debtor to collect their judgment against the Debtor, the Petitioners were acting to collect, assess or recover a claim against the Debtor in violation of the automatic stay provisions of §362(a)(6).

The Petitioners argue that the decision of the Eighth Circuit is in conflict with the case of Celotex Corp. v. Bennie Edwards, 514 U.S. 300, 131 L. Ed. 2nd 403, 115 S. Ct. 1493 (1995) and Edwards v. Armstrong World Industries, Inc., 6 Fd. 3rd 312 (5th Cir. 1993). The Respondent submits that these cases do not conflict with the decision of the Eighth Circuit rendered herein.

In Celotex v. Edwards the claimant sought to execute against a surety of Celotex (not directly against the debtor as in this proceeding) on a supersedeas bond. The supersedeas bond had been posted prior to the bankruptcy proceeding. The Court held that Celotex did not have a property interest in the bond at the time of the bankruptcy and therefore the provisions of 11 U.S.C. §362 did not prevent the claimant from executing against the surety. The question which was the focus of the Celotex v. Edwards case was whether the Bankruptcy Court had the authority to enjoin the claimant from executing on the supersedeas bond under 11 U.S.C. §105 when Celotex no longer had a property interest in the bond.

The Petitioners' argument has a fundamental flaw. It ignores the fact that its foreclosure action was against the

Debtor, not against a third party, such as the surety in Celotex. Regardless of the Debtor's interest in the property in question, the Petitioners proceeded with their execution against the Debtor. This act violates the plain language of §362(a)(6) which provides:

> [A] petition filed under...this title...operates as a stay... of (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

The Petitioners' execution against the Debtor also violates §362(a)(1) which provides:

> [A] petition filed under...this title...operates as a stay... of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

The Eighth Circuit held that the actions of the Petitioners were clearly to collect on their judgment against the Debtor. The Eighth Circuit distinguished this case from the cases holding that §362(a)(6) does not automatically stay post-petition acts to collect creditors' independent claims against the debtors' guarantors. The distinguishing factor is that §362(a)(6) does not automatically stay post-petition acts to collect creditors' independent claims against debtors'

guarantors. See In re Alcom Corp., 154 B.R. 97, 115-116 (Bankr. D.D.C. 1993); In re Advanced Ribbons & Office Prods., Inc., 125 B.R. 259, 265 (B.A.P. 9th Cir. 1991). In the case at hand, the Petitioners did not have a separate and independent claim against a third party surety. The Petitioners' only claim was directly against the Debtor. Therefore, there is no conflict between the Celotex line of cases and the decision of the Eighth Circuit in this matter.

CONCLUSION

Contrary to the argument of the Petitioners, the decision of the Eighth Circuit for which the Petitioners seek a Writ of Certiorari does not establish the rule "...that all parties are automatically barred from dealing in property in which neither the debtor nor the bankruptcy estate holds an interest..." Contrary to the argument of the Petitioners, the decision of the Eighth Circuit does not conflict with Celotex v. Edwards.

WHEREFORE, the Respondent respectfully requests that this Court deny the Petitioners' Petition for a Writ of Certiorari.

Dated: 7/25/97

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(4)

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No. 96-2045

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID A. SOSNE, TRUSTEE,

Petitioner,

v.

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether claims for alleged violations of the automatic stay under 11 U.S.C. §362 may be used as a substitute for the statutory method of avoiding pre-petition assignments and the recovery of the proceeds under 11 U.S.C. §§547, 548 and 550?

2. Whether 11 U.S.C. §362 automatically bars a party from collecting property to satisfy a pre-petition judgment against the bankruptcy debtor, when neither the bankruptcy estate nor the debtor has an interest in that property?

STATEMENT PURSUANT TO RULE 29.6

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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No. 96-2045

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID A. SOSNE, TRUSTEE,

Petitioner,

v.

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On or before June 26, 1997, David A. Sosne, bankruptcy trustee, filed his petition for a writ of certiorari with this Court, Case No. 96-2045.

Respondents did not file a brief in opposition.

However, respondents, as petitioners, filed a separate petition for a writ of certiorari from the same Eighth Circuit decision on June 27, 1997, Case No. 97-7.

David Sosne filed a brief in opposition to respondents' petition, but filed it in Case No. 96-2045 instead of Case No. 97-7. Respondents assume the clerk renumbered it and filed it in Case No. 97-7 instead of Case No. 96-2045.

On August 28, 1997, respondents were advised by the clerk that they were requested to file a brief in opposition to the petition of David Sosne in Case No. 96-2045.

It is respondents' position that the Court should grant certiorari in this case, but for the reason asserted by respondents, as petitioners, in Case No. 97-7, and not for the reasons asserted by David Sosne in Case No. 96-2045.

Reinert & Duree, P.C. are the attorneys for the other respondents, Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James C. Landes, who obtained a judgment for fraud against Just Brakes Corporate Systems, Inc. ("Just Brakes") in 1988. Just Brakes appealed that decision which was affirmed by the Missouri Court of Appeals.

On January 10, 1991, Just Brakes assigned all right, title and interest in its only asset, the trademark "Just Brakes" to F.G.R. Management, Inc.

Under Missouri law, which applies to determine the nature and extent of a debtor's interest in property, this pre-petition assignment is valid as to Just Brakes even if it is void as to its creditors. *Kahn v. Royal Banks of Missouri*, 790 S.W.2d 503, 506 [1,2] (Mo. App. 1990), *Loe v. Downing*, 325 S.W.2d 479, 482 [2] (Mo. 1959). State law controls this issue. *In Re: N.S. Garrott & Sons*, 772 F.2d 462, 467 [7,8]

(8th Cir. 1985). Just Brakes will never be restored to an ownership interest in the trademark no matter how fraudulent the assignment.

Respondents filed several ancillary lawsuits in St. Louis County, Missouri to facilitate execution of their judgment on the only asset of Just Brakes, its trademark, beginning in January, 1991.

After obtaining a court order compelling the sale of the trademark (which did not implicitly restore ownership of the trademark to Just Brakes, as asserted by petitioner), a sheriff's sale was scheduled for July 30, 1991.

Immediately before the sale, Just Brakes filed for Chapter 11 bankruptcy. The only significant claimed asset listed was the trademark which had already been assigned to F.G.R. Management, Inc. Almost all of the creditors listed were either the respondents or the owners of Just Brakes which had assisted it in committing the fraud resulting in respondents' judgment, or the attorneys or consultants representing Just Brakes in the fraud suit.

Respondents moved to dismiss the Chapter 11 case and the bankruptcy court granted the motion on September 24, 1991. App. 6. The Bankruptcy Court stated that the "claim for avoidance" of the pre-petition assignment of the trademark was an asset of the bankruptcy estate, while dismissing the Chapter 11 case. App. 6. Since the Chapter 11 bankruptcy case was dismissed, the respondents could not appeal that order, and had no need to. *In the Matter of Sims*, 994 F.2d 210, 214 [1,2] (5th Cir. 1993). As a result, that statement in the order of dismissal is not binding on the respondents under any principle of preclusion. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 [3] (2nd Cir. 1986).

The Court of St. Louis County then scheduled another sheriff's sale of the trademark for October 15, 1991. On that date, Just Brakes filed its second single asset bankruptcy, this time under Chapter 7, again listing an interest in the trademark as its, essentially, sole claimed asset. With few exceptions only the respondents and the parties that assisted Just Brakes in defrauding them or that represented or consulted with Just Brakes in the fraud suit were listed as creditors.

The Sheriff of St. Louis County (not the respondents as asserted by petitioner) proceeded with the sale of the trademark on October 15, 1991. App. 6. No one has challenged the propriety of proceeding with that foreclosure sale. App. 7, n. 1.

Respondents are accused of violating the automatic stay by applying for and obtaining a court order for the payout of the net proceeds of the sheriff's sale on October 24, 1991. App. 6, 7.

At that time the trustee had not filed any actions for avoidance of the pre-petition assignment of the trademark or for the recovery of the proceeds. Even the filing of such claims would not have vested any property rights in either the debtor or the trustee.

One year later the trustee filed an adversarial complaint for avoidance of the pre-petition assignment of the trademark and for, allegedly, violation of the automatic stay by requesting and obtaining the proceeds of the sheriff's sale. App. 7.

In 1993, the trustee dismissed his claims for avoidance and recovery under 11 U.S.C. §§547, 548 and 550, in order to avoid a jury trial at the District Court level, and, for

strategic purposes, limited his claim to alleged violations of the automatic stay. App. 7.

In this fashion the trustee attempted to substitute a claim for violation of the automatic stay, with respect to a claimed property interest in the trademark which had been assigned by the debtor more than nine months before the bankruptcy petition was filed, for claims for avoidance and recovery of the trademark or its proceeds under 11 U.S.C. §§547, 548 and 550.

The automatic stay bars actions against property of the debtor or the bankruptcy estate at the time the bankruptcy petition is filed. 11 U.S.C. §362.

Respondents respectfully submit that 11 U.S.C. §362(a)(6) must be read together with 11 U.S.C. §362(a)(2) which provides that the **enforcement** of a pre-petition judgment must be **against** the debtor or bankruptcy estate, not merely that the pre-petition judgment, which is being enforced, is against the debtor.

The trademark was not the property of the debtor at the time the bankruptcy petition was filed, since Just Brakes had assigned it to F.G.R. Management, Inc. more than nine months earlier.

The bankruptcy estate could acquire an interest in the trademark only through actions by the trustee for avoidance of the pre-petition assignment and recovery under 11 U.S.C. §§547, 548 and 550.

The Eighth Circuit held it was not necessary to determine whether a "claim for avoidance" of the pre-petition assignment of the trademark constituted property of either the debtor or the bankruptcy estate at the time Chapter 7 petition was filed. App. 9.

The statutes, 11 U.S.C. §§541(a)(1) & (3), 547, 548 and 550 and the cases, *In Re: Morning Treat Coffee Co., Inc.*, 77 B.R. 62, 65 [4] (M.D. La. 1987), *In Re: Springfield Furniture, Inc.*, 145 B.R. 520, 529 [6, 7] (E.D. Va. 1992), *In Re: Jameson's Foods, Inc.*, 35 B.R. 433 [1] (D.S.C. 1983) all hold that a claim for avoidance is not the property of the debtor at the time the bankruptcy petition is filed and does not become the property of the bankruptcy estate until the trustee successfully pursues a claim for avoidance under 11 U.S.C. §§547 or 548 and thereafter recovers the proceeds under 11 U.S.C. §550.

The automatic stay simply did not apply to property in which neither the debtor nor the bankruptcy estate had an interest.

Edwards v. Armstrong World Industries, Inc., 6 F.3d 312, 316, 317 [2-6] (5th Cir. 1993) held that the automatic stay did not bar the judgment creditors from collecting the proceeds of an appeal bond to satisfy a pre-petition judgment against the debtor, the Celotex Corporation, out of property in which the debtor no longer held an interest. That issue was not appealed further. However, if the automatic stay would have barred collection of a pre-petition judgment against the debtor, out of property in which neither the debtor nor the bankruptcy estate held an interest, the central issue in the same case on certiorari, *Celotex Corporation v. Bennie Edwards*, 514 U.S. 300, 131 L. Ed.2d 403, 115 S. Ct. 1493 (1995), would have been mooted. *Celotex* concerned the authority of the bankruptcy court to issue an injunction under 11 U.S.C. §105 under circumstances which are essentially identical to those presented here. If the automatic stay barred such post-petition efforts to collect a pre-petition judgment

against the debtor, out of property in which neither the debtor nor the bankruptcy estate held an interest, an injunction under 11 U.S.C. §105 would have been completely unnecessary. An 11 U.S.C. §105 injunction was neither requested nor issued in the case at bar.

The respondents submit that the automatic stay did not bar them from satisfying a pre-petition judgment against the debtor out of property in which neither the debtor nor the bankruptcy estate held an interest. There was no violation of the automatic stay.

REASONS FOR DENYING THE PETITION

I. The Eighth Circuit's decision requiring the trustee to prove claims for avoidance of a pre-petition assignment and recovery before permitting the trustee to recover damages for alleged violations of the automatic stay for dealing with the subject of such claims does not warrant review.

The trustee did not appeal the bankruptcy court's denial of his claim for punitive damages. App. 12. The Eighth Circuit correctly held that the trustee could not recover damages (of any kind) for an alleged violation of the automatic stay, where the trustee's alleged property interest was a "claim for avoidance" of the pre-petition assignment of the trademark, and the trustee had never established the claims for avoidance and recovery under 11 U.S.C. §§547, 548 and 550.

The trustee has attempted to avoid the need of proving his claims for avoidance of the pre-petition assignment and for recovery under the statutes provided for such actions by substituting a claim for an alleged violation of the automatic stay for such statutory actions. The Eighth

Circuit correctly determined that, as a first step, the trustee must establish his claims for avoidance and right of recovery under 11 U.S.C. §§547, 548 and 550 before he can claim damages for an alleged violation of the automatic stay with respect to the property that is the subject of such claims.

The trustee, however, dismissed all claims for avoidance and recovery, for strategic purposes, and the time for re-filing such claims has long passed. Any attempt of the trustee to re-plead claims for avoidance and recovery under 11 U.S.C. §§547, 548 and 550 is barred by the statute of limitations, and has been for many years. 11 U.S.C. §546(a) (1991). The subsequent amendment of §546(a) applies only to bankruptcy cases filed after October 22, 1994. The Chapter 7 case in question was filed on October 15, 1991.

Under the specific facts of this case, the questions presented for review in this petition will never be reached. Supreme Court review is certainly not warranted at this juncture.

CONCLUSION

For the reasons set forth above, the trustee's petition for a writ of certiorari should be denied. However, respondents respectfully submit that their petition for a writ of certiorari, No. 97-7, should be granted for the reasons stated therein.

Respectfully submitted,

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Dated September 29, 1997